Supreme Court, U.S.
FILED
JUL 13 2001
OFFICE OF THE CLERK

No. 00-973

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ALPHONSO VONN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR ALPHONSO VONN

MARIA E. STRATTON
Federal Public Defender
MONICA KNOX*
Deputy Federal Public Defender

321 East Second Street
Los Angeles, California 90012
(213) 894-2936

Counsel for Respondent
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether a defendant's challenge to his guilty plea based on a violation of Federal Rule of Criminal Procedure 11 is subject to plain-error review under Rule 52(b) if he failed to object to the violation in the district court.

2. Whether the nature of prejudice to be assessed when a guilty plea is taken in violation of Rule 11 is whether the defendant would have pleaded guilty absent the error.

3. Whether, in determining the existence of prejudice when a guilty plea has been taken in violation of Rule 11, the reviewing court is restricted to the transcript of the Rule 11 colloquy or may consider other matters.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

RULES INVOLVED 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 7

ARGUMENT 10

THE DISTRICT COURT'S FAILURE TO ADVISE RESPONDENT OF HIS RIGHT TO COUNSEL IF HE WENT TO TRIAL, AS REQUIRED BY RULE 11(c)(3), RENDERS RESPONDENT'S PLEAS UNINTELLIGENT AND ENTITLES HIM TO OBTAIN THE RELIEF OF HAVING HIS PLEAS VACATED 10

A. Rule 52(b)'s Plain Error Provision is Inapplicable to Rule 11 Violations 10

1. The Prerequisites for a Constitutional Guilty Plea 11

2. Rule 11: Development and Surrounding History 12

3. Rule 52(b) is Not Applicable to Rule 11 Errors 15

a. Error: Per Se, Harmless and Plain 15

b. The Advisory Committee Did Not Believe that An Unconstitutional Plea Could Be Harmless 16

TABLE OF CONTENTS – Continued

Page

c. Plain Error Review is Inappropriate When a Plea is Unconstitutional 21

B. Vonn is Not Required to Establish That Absent the Rule 11 Violation He Would Not Have Pleaded 26

1. A Defendant is Prejudiced under Rule 11 if The Plea is Unconstitutional 26

2. An Unconstitutional Plea Can Never Be Harmless Error 29

3. This Court Has Never Applied Harmless Error Analysis to an Unconstitutional Plea 32

4. The Government's Approach Would Insulate Virtually All Pleas from any Appellate Review 36

C. Appellate Review is Restricted to the Plea Colloquy 38

D. Vonn's Guilty Pleas Must be Vacated 45

CONCLUSION 50

TABLE OF AUTHORITIES

Page

CASES

Arizona v. Fulminante, 499 U.S. 279 (1991) 16, 29, 31

Barker v. Wingo, 407 U.S. 514 (1972) 22, 25

Bousley v. United States, 523 U.S. 614 (1998) 11, 25, 26, 37, 43, 44

Boykin v. Alabama, 395 U.S. 238 (1969) ..... *passim*

Brady v. United States, 397 U.S. 742 (1998) ..... *passim*

Brookhart v. Janis, 384 U.S. 1 (1966) 23

Chapman v. California, 386 U.S. 18 (1967) 16, 29

Custis v. United States, 511 U.S. 485 (1994) 9

Daniels v. United States, 121 S.Ct. 1578 (2001) 9

Douglas v. Alabama, 380 U.S. 415 (1965) 46

Duncan v. Walker, ___ U.S. ___, 121 S.Ct. 2120 (2001) 20

Henderson v. Morgan, 426 U.S. 637 (1976) ..... *passim*

Hill v. Lockhart, 474 U.S. 52 (1985) 34, 35

Hill v. United States, 368 U.S. 424 (1962) 18, 19

Johnson v. Ohio, 419 U.S. 924 (1974) 13

Lewis v. United States, 146 U.S. 370 (1912) 39

McCarthy v. United States, 394 U.S. 459 (1969) ... *passim*

McMann v. Richardson, 397 U.S. 759 (1970) 12, 44

Minnick v. Mississippi, 498 U.S. 146 (1990) 40

Mitchell v. United States, 526 U.S. 314 (1999) 7, 12

TABLE OF AUTHORITIES – Continued

Page

North Carolina v. Alford, 400 U.S. 25 (1970) 7, 11, 12

Osborne v. Ohio, 495 U.S. 103 (1990) 46

Parke v. Raley, 506 U.S. 20 (1992) 11

Parker v. North Carolina, 397 U.S. 790 (1970) 11

Peguero v. United States, 526 U.S. 23 (1999) 36

Roe v. Flores, 528 U.S. 470 (2000) 36

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) 11

Speiser v. Randall, 357 U.S. 513 (1958) 26

Strickland v. Washington, 466 U.S. 668 (1984) 35, 36

Sullivan v. Louisiana, 508 U.S. 275 (1993) .. 29, 30, 31, 32

Tollett v. Henderson, 411 U.S. 258 (1973) 7

United States v. Coronado, 554 F.2d 166 (5th Cir. 1977) 20, 44

United States v. Driver, 242 F.3d 767 (7th Cir. 2001) 42

United States v. Journet, 544 F.2d 633 (2d Cir. 1976) 20

United States v. Olano, 507 U.S. 725 (1993) 16, 26

United States v. Timmreck, 441 U.S. 780 (1979) 18, 25, 33, 37

United States v. Yong, 470 U.S. 1 (1985) 39

Von Moltke v. Gillies, 332 U.S. 708 (1948) 43

Wainwright v. Sykes, 433 U.S. 72 (1977) 23

TABLE OF AUTHORITIES – Continued

Page

STATUTES

18 U.S.C. § 924 2

18 U.S.C. § 2113 2

28 U.S.C. § 1254 1

RULES

Federal Rules of Criminal Procedure

Rule 11 ..... *passim*

Rule 32 ..... 18, 36

Rule 43 24

Rule 52 ..... *passim*

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 224 F.3d 1152. A prior opinion, withdrawn and modified upon rehearing, is reported at 211 F.3d 1109.

JURISDICTION

The court of appeals initially entered judgment on April 20, 2000. Judgment on rehearing was entered on September 14, 2000. The petition for writ of certiorari was filed on December 13, 2000, and granted on February 26, 2001. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RULES INVOLVED

The relevant provisions of Rules 11 and 52 of the Federal Rules of Criminal Procedure are reproduced in the Appendix.

STATEMENT OF THE CASE

Alphonso Vonn was 21 years old when he was arrested for the first time in his life, placed into custody, and charged with serious felonies. He had a difficult time understanding the proceedings or his attorney; he asked questions often and expressed frustration frequently. Eventually, he pleaded guilty to all the charges against him, although the record is clear that he did not always act with a full understanding of the proceedings.

On February 27, 1997, Vonn was arrested on a criminal complaint that charged him and two others with armed bank robbery and the use of a firearm during a crime of violence. 18 U.S.C. §§ 2113(a)(d), 924(c); JA 12-13. The following day Vonn, and several other arrestees charged in unrelated complaints, made an initial appearance before a magistrate judge. Before calling the calendar to arraign the individual defendants on the complaints against them, the magistrate made a statement collectively to all the defendants present. He explained that they were in court because they had been charged with a criminal offense and that they either should have received or would receive a copy of the formal papers charging them. He set forth some of the constitutional and statutory rights held by criminal defendants, including the right to retained counsel, the right to appointed counsel if one could not afford retained counsel,[1] the obligation to tell the truth on any financial declaration, the right to remain silent, the right to a determination of bail and several other rights regarding detention, the right to a preliminary hearing or grand jury proceeding (including an explanation of what a grand jury is), and the rights involved in cases arising out of other judicial districts. JA 14-17.

When Vonn's turn came to be arraigned, the magistrate asked him if he had been present when the rights had been given and if he had heard and understood

[1] Although the magistrate advised the defendants that they had the right to representation by retained counsel at every stage of the proceedings, he did not make that express advisement as to appointed counsel.

them. Vonn answered, "Yes, sir." The Public Defender was appointed to represent Vonn. JA 17-18.

The grand jury returned an indictment on March 14, 1997, charging Vonn with armed bank robbery and the use of a gun. On March 17, 1997, Vonn and several other defendants indicted in unrelated cases appeared before a district judge for post-indictment arraignment. As the magistrate had done, the district court judge made comments to the defendants collectively before calling them individually to arraign them. The judge told the defendants that they were present in court because they had been indicted and that they would receive a copy of the indictment and then be called upon to plead. She told the defendants that they had the right to a trial (jury trial or judge trial, public trial and speedy trial), that they had the right to be represented by counsel at all stages of the proceedings, that counsel would be appointed if they could not afford to retain one, that a financial affidavit would be required and any false statement on the form could result in further prosecution, that they had the right to confront, cross-examine and subpoena witnesses, that they had the right to a determination of bail, that the burden would be on the government to prove their guilt beyond a reasonable doubt, that a district court judge would preside at all further proceedings, that motions had to be made before the judge, and that codefendants would be assigned to the same judge. She also advised of the duty of a private attorney seeking to represent any defendant and the obligations of all attorneys to make and arrange for appearances. JA 21-24.

When Vonn's turn came to be arraigned, he appeared with counsel, who noted that Vonn had signed and counsel had filed a written advisement of constitutional rights.

The judge then addressed Vonn to determine that he had heard and understood the statements that she had earlier made, that he had received a copy of the indictment and that he did not wish the indictment read to him. The judge then assigned the matter to a particular district court judge for further proceedings. The judge never actually arraigned Vonn, never asking him how he wished to plead. JA 24-25.

On May 5, 1997, a status conference was held in the matter. By that point, both of Vonn's codefendants had signed plea agreements with the government. The judge asked Vonn's lawyer what Vonn was going to do; when the lawyer asked for a minute, Vonn asked to speak on his own behalf. Vonn told the judge: "I'm not quite understanding what he's [counsel's] trying to – what's the information given to me, because I don't know nothing about the system. So I don't really know – understand what he is saying." The judge responded by telling Vonn to talk further with his lawyer, and a recess was taken. JA 30-31.

After the break, Vonn's lawyer indicated that Vonn was prepared to go forward with a change of plea but that he, the lawyer, was not. The judge advised Vonn that going forward without his lawyer's agreement would "complicate[ ] things." Vonn then asked if he could get a new lawyer. The judge responded: "You can hire one if you have the money. But you'd have to give me a good reason to fire this one. And I don't see any good reason for it." Vonn again told the judge, "[H]e's not explaining everything to me right. . . . He comes down to see me a lot, and it's still not adding up." The judge summarily put the matter over a week, telling Vonn that he was "sure it will all be clear [to] you by next Monday." JA 32-33.

The next Monday, May 12, 1997, Vonn pleaded guilty to armed bank robbery. The court failed to advise him of his right to counsel if he went to trial. Vonn expressly objected to the government's recitation of the factual basis for the plea insofar as it stated that Vonn had a gun in the bank. Vonn did not plead guilty to the use of a gun; trial was set for that count. JA 34-45.

In August, the government obtained a superseding indictment, adding a count of conspiracy to the bank robbery and gun use counts. On September 3, 1997, Vonn pleaded guilty to the conspiracy and gun use counts. Again, the court forgot to advise Vonn that he had the right to counsel at a trial. This time, the prosecutor brought the failure to the court's attention: "I don't remember hearing the Court inform the defendant of his right to assistance of counsel." The judge responded: "I didn't because he is represented by counsel." JA 61.

The government set forth facts that it believed it could prove at a trial for the factual basis of the plea. Those facts included that Vonn planned the robbery with two others and that he knew that his accomplices would actively display guns in the course of the robbery, and in fact that they did so. When the judge asked Vonn if that was the way the bank robbery occurred, Vonn responded: "The bank robbery, sir, but not the guns. I didn't know they were carrying weapons until we entered the bank, sir." The judge nevertheless found a factual basis for the plea to use of a weapon during a crime of violence. JA 59-60.

On May 14, 1998, Vonn moved to withdraw his plea. That motion was heard just before sentencing on June 8, 1998. Vonn's lawyer contended that Vonn had pleaded guilty to the use of a gun under a mistake, noting that

Vonn had consistently stated that he had not used a gun and he had been unaware that his accomplices had guns until they were already in the bank. The judge responded that he had read the probation report and it was "clear" that all three robbers had used guns, so Vonn's contention that he didn't know that guns were going to be used was "clearly not tenable." JA 62-65.

The judge then sentenced Vonn, a first-time offender, to prison for 97 months, the high end of the applicable Guidelines range. JA 8.

Vonn appealed the judgment. He challenged the validity of both his pleas, contending that both involved Rule 11 violations in the failure of the district court to advise him of his right to counsel at trial as required by Rule 11(c)(3). The government agreed that error had occurred and that the proper test for determining prejudice was harmless error under Rule 11(h). The government also agreed that the error was prejudicial unless the defendant had otherwise known of his right. The court of appeals vacated the pleas, holding that under Rule 11(h) the failure to advise Vonn of his right to counsel at trial was not harmless because the record did not establish that Vonn had known of his right.

On rehearing, the government argued for the first time that the appellate court should look to other proceedings to determine whether Vonn knew of his right to assistance of counsel at trial. But the government never challenged the application of Rule 11(h) or the nature of the prejudice until it filed for certiorari.

SUMMARY OF ARGUMENT

There are two ways under our system of criminal justice in which the factual guilt of a defendant may be established such that he may be deprived of his liberty consistent with the Due Process Clause. The first is by a verdict by a jury or judge, finding, after a trial providing all the rights set forth in the Fifth and Sixth Amendments, that the elements of the crime have been proven beyond a reasonable doubt. The second is by a plea of guilty: the defendant's own admission "in open court that he is in fact guilty of the offense with which he is charged." *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). Over 90 percent of federal criminal defendants whose cases are not dismissed plead guilty. *Mitchell v. United States*, 526 U.S. 314, 324 (1999).

Despite the fact that the vast majority of criminal defendants plead guilty and forego trials, this Court has addressed the requirements for a valid guilty plea, and the ramifications of an invalid plea, much less often than it has addressed the requirements for a fair trial. Still, both the Constitution and the Federal Rules of Criminal Procedure put limits on what will pass as a valid guilty plea.

To comport with due process, a plea must be both voluntary and intelligent, that is, it must be a *free* and *informed* choice among available alternatives. *North Carolina v. Alford*, 400 U.S. 25, 30 (1970). To make a genuinely informed choice, the defendant must know the nature of the charge he is admitting, the constitutional rights he is giving up by foregoing a trial, and the custodial consequences of a conviction. *Henderson v. Morgan*, 426 U.S. 637, 645 (1976); *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *Brady v. United States*, 397 U.S. 742, 755 (1998).

Rule 11 of the Federal Rules of Criminal Procedure sets forth the procedure to be used for the taking of guilty pleas in federal court. It places a duty on the district court to make specific advisements and inquiries personally of the defendant. The purpose of the rule is twofold: to ensure voluntary and intelligent pleas and to provide a complete record at the time the plea is entered of the factors relevant to the voluntariness and intelligence determination. *McCarthy v. United States*, 394 U.S. 459, 465 (1969).

The issues presented in this case involve the nature of appellate review of a plea taken in violation of Rule 11. The district court did not fulfill its duties under Rule 11 in taking Vonn's pleas: both times, the district court failed to advise Vonn of his right to counsel if he should go to trial. Neither Vonn nor his attorney brought the failure to the district court's attention, although the prosecutor did so during the second plea. Still, the district court failed to advise.

The government contends that the failure of Vonn or his attorney to object requires an appellate court to review the record for "plain error" under Rule 52(b). But, as Vonn will show, plain error is entirely inapplicable to Rule 11 violations. Rule 11 has its own harmless error provision, and any violation of Rule 11 rendering a plea involuntary or unintelligent is prejudicial per se.

The government contends that the prejudice relevant to a Rule 11 violation is whether the defendant would have pleaded guilty absent the violation. That test of prejudice, however, would entirely supplant voluntary and intelligent pleas with, what in the government's view or in an appellate court's view would be, wise pleas. The proper test of prejudice is whether the defendant actually

had the knowledge to make his plea intelligent. If the record does not show that he did, his plea is unintelligent and cannot stand.

Finally, the government contends that a reviewing court should be able to go outside the record of the plea colloquy in determining whether the plea was voluntary and intelligent. But a plea must be voluntary and intelligent *at the time it is made*. It makes no sense to allow prior or subsequent events to be considered in determining the defendant's state of mind and knowledge at the time the plea was made, and Rule 11 contemplates consideration of only the plea colloquy in appellate review of pleas.

Criminal convictions have lifelong effects on those convicted. They usually result in immediate prison terms, they often result in many years of adverse social and employment consequences, and they frequently result in lengthy enhancements to subsequent prison terms. Yet in recent years, Congress and this Court have severely restricted the ability of a defendant to collaterally challenge a prior conviction. *See, e.g.*, Antiterrorism and Effective Death Penalty Act of 1996; *Daniels v. United States*, 121 S.Ct. 1578 (2001); *Custis v. United States*, 511 U.S. 485 (1994). Since most of these convictions are based on guilty pleas, a proper respect for the administration of justice requires that all due care and concern be taken to ensure that the pleas are valid in the first instance. The rules proffered by the government would allow judgment to be entered upon unintelligent pleas and then those pleas would be insulated from any meaningful review thereafter. That is constitutionally unacceptable.

ARGUMENT

THE DISTRICT COURT'S FAILURE TO ADVISE RESPONDENT OF HIS RIGHT TO COUNSEL IF HE WENT TO TRIAL, AS REQUIRED BY RULE 11(c)(3), RENDERS RESPONDENT'S PLEAS UNINTELLIGENT AND ENTITLES HIM TO OBTAIN THE RELIEF OF HAVING HIS PLEAS VACATED

The district court failed to advise Vonn during either of the plea colloquies that, if he went to trial, he had the right to counsel at that trial. The government concedes that the failure to so advise Vonn violates Rule 11 of the Federal Rules of Criminal Procedure. The issues presented by this case involve how the appellate court is to determine whether a defendant whose guilty plea violates Rule 11 is entitled to relief. Vonn will show that absent an indication from the plea colloquies that he knew of his right to counsel despite the district court's failure to advise him, the pleas must be vacated. The government's contentions that plain error applies, that Vonn must show he would not have pleaded absent the error, and that a reviewing court may look at matters outside the record of the plea colloquy are belied by the history and provisions of Rule 11 and this Court's jurisprudence regarding guilty pleas.

A. Rule 52(b)'s Plain Error Provision is Inapplicable to Rule 11 Violations

To determine the applicability of plain error review to a deficient plea it is necessary to consider both the prerequisites for a constitutional guilty plea and the history and development of Rule 11.

1. The Prerequisites for a Constitutional Guilty Plea

A guilty plea is "a grave and solemn act to be accepted only with care and discernment." *Brady v. United States*, 397 U.S. at 748. Such a plea is constitutionally valid only to the extent it is both "voluntary" and "intelligent." *Bousley v. United States*, 523 U.S. 614, 618 (1998); *North Carolina v. Alford*, 400 U.S. at 30 (stating standard for judging a guilty plea as whether it represents "a voluntary and intelligent choice among the alternative courses of action open to the defendant"). Although this Court has periodically conflated the two prerequisites,[2] it has repeatedly underscored the fact that the question whether a person has acted voluntarily is quite distinct from the question whether he has made a knowing and intelligent choice. *See, e.g., Brady*, 397 U.S. at 749-58; *Parker v. North Carolina*, 397 U.S. 790, 794-98 (1970); *see also Schneckloth v. Bustamonte*, 412 U.S. 218, 237-38 n.25 (1973).

---

[2] In *Henderson v. Morgan*, 426 U.S. 637, for example, the Court spoke of the intelligence requirement for a guilty plea as an aspect of voluntariness, stating that a plea may be "involuntary" either because the accused does not understand the nature of the constitutional protections he is waiving or he has an incomplete understanding of the nature of the charges. *Id.* at 645 & n.13.

On occasion, the Court has also interchanged "intelligent" and "knowing," describing the "voluntary and intelligent" requirement using slightly different language. *See, e.g., Parke v. Raley*, 506 U.S. 20, 28-29 (1992) (describing standard both as "knowing and voluntary" and as "voluntary and intelligent"); *Boykin v. Alabama*, 395 U.S. at 241-42 (describing standard both as "voluntar[y] and knowing[ ]" and as "intelligent and voluntary").

The voluntariness of a plea turns on the extent to which a defendant is permitted to make a *free choice* among the available alternatives. Thus, a plea is involuntary if it is the product of threats, improper promises, or other forms of wrongful coercion. *See Brady*, 397 U.S. at 748.

The intelligence of a plea, on the other hand, turns on the extent of the defendant's knowledge, he must have sufficient information (and a sufficient understanding of the information) to choose inteliigently between the alternatives. Thus, a plea is unintelligent if the defendant is without the information necessary to assess meaningfully "the advantages and disadvantages of a trial as compared with those attending a plea of guilty." *Brady* at 754; *see also McMann v. Richardson*, 397 U.S. 759, 766 (1970) (stating plea "must be an intelligent act done with sufficient awareness of the relevant circumstances and likely consequences") (citations omitted).

Although the Court has not directly addressed the full scope of the information a defendant must have in order for his plea to be considered intelligent, at a minimum a defendant must be aware of three things: the nature of the offense he is admitting, *Henderson v. Morgan*, 426 U.S. at 645; the constitutional rights he is surrendering by not going to trial, *Boykin*, 395 U.S. at 243; and the direct consequences of his plea (generally, the period of incarceration a conviction subjects him to), *see Alford*, 400 U.S. at 29 n.3; *Brady*, 397 U.S. at 755.

2. Rule 11: Development and Surrounding History

The purpose of Rule 11 is, and has always been, to ensure voluntary and intelligent pleas. *Mitchell v. United*

States, 526 U.S. at 322. Rule 11 began as a relatively brief and simple statement precluding the court from accepting a guilty plea without first determining that the plea was made voluntarily and with an understanding of the nature of the charge. In 1966, the rule was amended to add requirements that the court address the defendant personally in determining the voluntariness of the plea, that the court ensure that the defendant understands the consequences of the plea, and that the court satisfy itself there is a factual basis for the plea; but the rule remained short, with few explicit directives, through 1974.

In 1969, this Court decided two major guilty plea cases: *Boykin v. Alabama*, *supra*, and *McCarthy v. United States*, *supra*. In *Boykin*, the Court held that for a plea to meet the constitutional requirements of voluntariness and intelligence, there must be an affirmative showing of the defendant's knowing waiver of the constitutional rights he is giving up by foregoing a trial: the privilege against self-incrimination, the right to trial by jury, and the right to confront and cross-examine his accusers.[3] 395 U.S. at 243-44. In *McCarthy*, the Court held, pursuant to its

---

[3] A defendant gives up other significant constitutional rights when he foregoes a trial and pleads guilty, including the right to counsel and compulsory process at trial and the right to have the government prove his guilt beyond a reasonable doubt. In *Boykin*, the Court did not discuss the role of those rights in the taking of a guilty plea, and the Court has never expressly discussed whether *Boykin*'s enumeration is illustrative or exhaustive. The issue, before and after *Boykin*, is the knowledge necessary to make an intelligent decision about whether to go to trial. Such a decision would take, at a minimum, knowledge of the trial rights expressly set forth in the Fifth and Sixth Amendments. *See Johnson v. Ohio*, 419 U.S. 924 (1974) (Douglas, J., dissenting from denial of certiorari).

supervisory authority over the lower federal courts, that a defendant is entitled to plead anew if the district court accepts his guilty plea "without fully adhering to the procedure provided for in Rule 11." 394 U.S. at 463-64.[4]

In 1975, Rule 11 was substantially amended. In place of the prior general directives about determining the plea was voluntary and made with an understanding of the nature of the charge and the consequences of the plea, the rule added specific provisions regarding the nature of the colloquy the court was to hold with the defendant. Subsection (c) addressed the advice relevant to ensuring the plea was intelligent: it required that the court personally address the defendant and advise him of, and make sure he understood, 1)the nature of the offense and the penalty for it, 2) his right to appointed counsel at all stages of the proceedings, 3) the trial rights surrendered by pleading guilty (jury trial, assistance of counsel at trial, confrontation and cross-examination, and protection against self-incrimination), and 4) that a guilty plea means there will be no trial. Subsection (d) addressed the actions relevant to ensuring the plea was voluntary: it required that the court personally address the defendant and determine that the plea was not induced by force, threat or promises.[5]

---

[4] In *McCarthy*, the district court had not addressed the defendant personally regarding his knowledge and understanding of the nature of the charged offense. 394 U.S. at 461 & App. A.

[5] The other provisions added to Rule 11 at the time did not go to assuring the voluntary or intelligent aspects of the plea. Subsection (a) provided for alternative pleas, subsection (b) provided the circumstances under which a plea of nolo contendere could be accepted, subsection (e) addressed plea agreements and the procedure therefor, and subsection (f) required the court to find a factual basis before taking the plea. Subsection (g) was also added, requiring a verbatim record of the plea colloquy proceedings; that subsection, while not directly relevant to assuring voluntary and intelligent pleas, is meant to provide an adequate record for the assessment of whether the plea was voluntary and intelligent. *See* Advisory Committee Notes; *McCarthy*, 394 U.S. at 465.

With a few additions in subsequent years, Rule 11 has remained the same since 1975. The change potentially relevant to this proceeding is the 1985 addition of subsection (h) regarding harmless error and providing that "[a]ny variance from the procedures required by this rule which does not affect substantial rights shall be disregarded."[6]

3. Rule 52(b) is Not Applicable to Rule 11 Errors

a. Error: Per Se, Harmless and Plain

Whenever a court determines error has occurred, it must decide whether to remedy the error.[7] Some errors, by their very nature, so significantly affect the entire

---

[6] The changes not relevant to this proceeding include the 1982 provision that the defendant be advised of any special parole term (later broadened to include a supervised release term also), the 1983 provision allowing for conditional pleas, the 1985 provision that the defendant be advised of the possibility of restitution, and the 1999 provision that the defendant be advised of any appeal waiver in a plea agreement.

[7] In some situations, the court must also decide the nature of the remedy. That is not an issue in this case, as the only possible remedy would be to vacate the plea. The government does not argue that a different remedy is appropriate, but rather that the error requires no remedy.

structure of the proceeding that they are remedied without any analysis of how they might have affected, or not affected, the particular proceeding at hand. *Arizona v. Fulminante*, 499 U.S. 279, 309-310 (1991). Most errors are subject to harmless error analysis, which calls for the error to be remedied unless the government can show that the error did not affect the proceeding. *Chapman v. California*, 386 U.S. 18, 24 (1967); Fed. R. Crim. P. 52(a). But a more stringent review, plain error review, is reserved for most errors not preserved for review by objection in the lower court; plain error review allows for an error to be remedied only if the defendant can show that the error did affect the proceedings. *United States v. Olano*, 507 U.S. 725 (1993); Fed. R. Crim. P. 52(b).

The government contends that plain error review is appropriate in this case because Vonn did not object in the lower court to the inadequate advice given him by the district court before it accepted his guilty pleas. The government relies on Rule 52(b), contending that Rule 11(h)'s harmless error provision is not the exclusive method of review for Rule 11 errors. But the government's argument ignores the history of Rule 11, the Advisory Committee's Notes regarding subsection (h), and the nature of the error in this case. Plain error review has no application to any Rule 11 error, and a Rule 11 error that goes to the essence of whether the plea was voluntary and intelligent is never harmless.

b. The Advisory Committee Did Not Believe that An Unconstitutional Plea Could Be Harmless

Rule 52 has existed in the same form since the Federal Rules of Criminal Procedure were first adopted in

1944. Thus, when the Court in *McCarthy* held that "a defendant is entitled to plead anew if a United States district court accepts his guilty plea without fully adhering to the procedure provided for in Rule 11," 394 U.S. at 463-64, it implicitly rejected the application of Rule 52 to Rule 11 violations.

Fifteen years after *McCarthy*, subsection (h) was added to Rule 11. There is no question that the addition was intended to abrogate *McCarthy*'s per se rule *to some extent*; the issue is to what extent. The history shows two things: first, that the addition of subsection (h) was meant to abrogate *McCarthy*'s per se rule only when the violation did not directly affect the voluntariness or intelligence of the plea, and second, that the plain error review of Rule 52(b) was not meant to apply.

At the time *McCarthy* was decided, Rule 11 was still a short, relatively simple statement, requiring that the court ensure that a plea was voluntary and intelligent. As the rule expanded to encompass several explicit directives to the district court, and particularly with the extensive changes in 1975, the risk of noncompliance became greater. But although the purpose of Rule 11 has always been to ensure voluntary and intelligent pleas, not all the provisions of the amended rule implicated the voluntary or intelligent nature of the plea. Thus, even before the addition of subsection (h), the Advisory Committee had raised concerns about the automatic vacating of a plea due to a Rule 11 violation that did not go to the voluntary or intelligent nature of the plea. In 1982, for example, the Advisory Committee spoke disparagingly of the "remarkable result" of courts vacating pleas for the failure to advise a defendant of the possibility that any false statement given under oath at the plea colloquy could subject

him to perjury charges (Rule 11(c)(5)); the Committee noted that subsection (c)(5) is "qualitatively distinct from the other sections of the Rule. It does not go to whether the plea is knowingly or voluntarily made . . . ."[8]

It is a Rule 11 violation that does not affect the voluntariness or intelligence of the plea that the Committee had in mind when it added (h) in 1985. In discussing the amendment, the Committee noted that *McCarthy*'s rule of automatic vacating of the plea had not been restricted by the circuits to cases on direct appeal but was being used to vacate pleas when a motion to withdraw a plea was made, Rule 32(d),[9] or when a collateral challenge was made on habeas. The Committee was legitimately concerned with how such developments adversely affected the interest in finality, but it found that interest of "lesser weight" when a direct appeal is involved, specifically noting that the standard of *Hill v. United States*, 368 U.S. 424 (1962), would not be applicable to a direct appeal challenge.[10]

---

[8] That same year, Rule 11(c)(1) was amended to add that a district court should advise a defendant of any potential special parole term, but the Advisory Committee expressly noted that the "amendment should not be read as meaning that a failure to comply with this particular requirement will inevitably entitle the defendant to relief." The Committee cited *United States v. Timmreck*, 441 U.S. 780 (1979), in which this Court held that a technical violation of Rule 11 not amounting to a constitutional error did not entitle a prisoner to relief on habeas.

[9] In 1985, Rule 32(d) allowed for the withdrawal of a plea of guilty to "correct manifest injustice" at any time; currently, Rule 32(e) allows for a motion to withdraw a plea of guilty only before sentencing.

[10] In *Hill*, the Court held that the nonconstitutional error of failure to ask the defendant if he wished to speak personally before he was sentenced, Rule 32(a), is not, without more, remediable on habeas. 368 U.S. at 428. The Court expressly left open the question of whether such a claim would be cognizable on habeas if the defendant alleged that he had had something particular to say at sentencing. *Id.* at 429.

But the Advisory Committee Notes make it clear that the addition of subsection (h) was not meant to allow courts to find "harmless" Rule 11 violations that affected the voluntary or intelligent nature of the plea. The Committee's examples, based on the caselaw, of what would be deemed harmless, and what would not be, are illustrative. Noting that the class of Rule 11 violations that could be considered harmless on direct appeal would be "fairly limited," the Committee gave as examples the judge's failure to advise about an element of the offense where the plea colloquy shows that the defendant was fully aware of the element, the judge's understating of the maximum confinement time where the defendant actually receives less time than the judge did advise him was possible, and the judge's failure to tell the defendant that false statements made under oath at the colloquy could subject the defendant to perjury charges.

On the other hand, the examples the Committee gave of Rule 11 violations which would still call for vacating the plea went either to the voluntariness of the plea (such as the judge abdicating to the prosecutor the responsibility for giving the defendant Rule 11 warnings, which would create an atmosphere of "subtle coercion") or the intelligence of the plea (such as the judge's failure to advise the defendant of the nature of the charges against him).

Given the history, the context, and the Advisory Committee Notes, it is thus clear that the addition of subsection (h) to Rule 11 was meant merely to prevent the vacating of pleas based on violations that did not go to the voluntariness or intelligence of the plea, that is, violations of provisions other than those in subsection (c) (nature of the charge, confinement time, and constitutional rights being waived) and (d) (force, threats or promises). To achieve that end, the Committee borrowed the language of Rule 52(a). The government suggests that this tells us nothing about the applicability of Rule 52(b) to Rule 11 violations, but it really tells us a great deal.

First, since the Advisory Committee was borrowing the language of Rule 52(a), there can be no question that Rule 52 was not "overlooked." Indeed, the Committee Notes reflect express consideration of 52(a). The government suggests that this does not show consideration of 52(b); but these are all provisions of the same rules, the Federal Rules of Criminal Procedure. As this Court has repeatedly recognized, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Duncan v. Walker*, ___ U.S. ___, 121 S.Ct. 2120, 2124 (2001) (internal quotations omitted).

Second, the very genesis of the addition of subsection (h) to Rule 11 was the application by the circuits of *McCarthy*'s per se approach of vacating the plea for a rule violation. All of the cases discussed by the Advisory Committee were direct appeal cases in which there had been no objection in the district court. *See, e.g., United States v. Coronado*, 554 F.2d 166 (5th Cir. 1977); *United States v. Journet*, 544 F.2d 633 (2d Cir. 1976). Thus, it is clear that the Committee considered challenges on direct appeal when no objection had been made below; indeed, those appear to be the *only* cases the Committee had in mind when subsection (h) was added to Rule 11.[11]

Third, the Committee's concern was *not* whether the violation had been brought to the district court's attention; indeed, the Committee did not raise that concern even as to plea challenges raised on habeas.[12] The Committee's concern was with the vacating of pleas because of some minor or technical violation of Rule 11. And in discussing that concern, the Committee expressed frustration with the automatic vacating of pleas "[n]otwithstanding the declaration in Rule 52(a)." Thus, the very goal of the Committee in adding subsection (h) was to make it clear that Rule 52(a) *was* applicable to a Rule 11 violation. It is inconceivable that the Committee would not have included the language of 52(b) in subsection (h) if it had meant for the failure to object to play a role in appellate review.

c. Plain Error Review is Inappropriate When a Plea is Unconstitutional

The Committee's apparent decision not to penalize the failure to object to Rule 11 violations makes eminent sense. For many reasons, the taking of a guilty plea is a

---

[11] There was no objection in the district court in *McCarthy*, and yet the Advisory Committee expressly recognized that the error in that case would require relief even under subsection (h).

[12] The Committee drew a distinction between direct appeal challenges and collateral challenges, but only as to how they differ in terms of the interests in finality.

unique proceeding, and Rule 11 violations which go to the voluntary or intelligent nature of the plea are unique errors. The concerns underlying plain error review are simply not applicable to such proceedings and such errors.

First, Rule 11 places a duty *on the court* to inquire and advise. There is no duty on the defendant to ask to be advised and questioned. In the usual case outside Rule 11, a court's duty is triggered only by a defendant asserting his right; thus, for example, a court has a duty to rule lawfully on the admissibility of evidence but only if the defendant challenges the admissibility. But in the context of Rule 11, where a defendant has no duty and the court has an express duty, it makes no sense to suggest that the defendant has forfeited the error because he has failed to act. *See Barker v. Wingo*, 407 U.S. 514, 527 (1972) (discussing why defendant's failure to assert speedy trial rights does not operate as a waiver and noting: "A defendant has no duty to bring himself to trial; the State has that duty. . . . ") (footnote omitted).

Second, the rule of forfeiting issues by failing to raise them in the trial court developed in the context of counsel being allowed to make most trial decisions. When the government speaks of Vonn forfeiting his right to have the court advise him as required by Rule 11, it is holding Vonn responsible for the inaction of his attorney.[13] But that makes no sense in the context of a voluntary and

---

[13] Surely, a defendant cannot be expected to personally object to the court's failure to advise him of rights when he doesn't know that the court has any duty to do so; and certainly he cannot be expected to remind the court of what advice it is supposed to be giving when the very duty of the court to advise supposes a lack of knowledge on the part of the defendant.

intelligent plea or the waiver of the constitutional rights involved in such a plea because those rights are personal to the defendant and cannot be waived or forfeited by counsel. Vonn's lawyer could not have expressly stipulated to the court's bypass of Rule 11. *See Brookhart v. Janis*, 384 U.S. 1 (1966). How does the lawyer's silence operate to forfeit Vonn's right to those protections?

Third, the purposes behind the raise-or-forfeit rule of plain error are simply not relevant to Rule 11 violations. Judicial economy and the prevention of unfair manipulation by the defense are the reasons given for the raise-or-forfeit rule. *See Wainwright v. Sykes*, 433 U.S. 72, 89-90 (1977). The government suggests those goals are furthered in the Rule 11 context by requiring defense counsel to object, thereby allowing the district court to correct the error on the spot and preventing the defendant from later using the Rule 11 violation to vacate a plea he has become dissatisfied with. But in the unique context of Rule 11 violations, a defense objection is *not* necessary to achieve those aims.

One of the unique aspects of a Rule 11 colloquy is that *all* parties – the judge, the prosecutor and the defense attorney – operate with exactly the same knowledge. That is very different from the usual situation during pretrial motions or during trial itself, when neither the court nor the prosecutor is privy to the information or the strategies of the defense. During a Rule 11 colloquy, all parties have the same information and all parties have the same interest in making sure that the plea is valid. All the parties know what Rule 11 requires. All the parties know whether the court has fulfilled its obligations under the rule. All parties know whether the defendant has done and said all that is necessary for his plea to be considered

valid under the Constitution and under the rule. Any defense inclination, intentional, negligent or merely inadvertent, to subvert judicial economy or manipulate the system is easily and effectively curtailed by the court making sure that the provisions of the rule are followed.[14]

Finally, although the provisions of Rule 11 are not constitutional, they are prophylactic rules meant to ensure the constitutional requirement that a guilty plea be voluntary and intelligent.[15] And the advice required by subsection (c)(3) in fact concerns the constitutional rights the defendant is giving up by pleading guilty. A waiver of those constitutional rights is necessary for a plea to be considered intelligent. *Boykin*, 395 U.S. at 243. A court cannot presume a waiver of these constitutional rights from a silent record. *Id.* And because the rights are personal to the defendant, the waiver must be express,

---

[14] The prosecutor also has the information necessary to ensure that a proper and thorough plea is taken and that the defense is not left with the possibility of frustrating judicial economy or manipulating the system. Rule 11 places the duty on the court to ensure that the plea is properly taken, but the prosecutor's presence and access to full information can be a "safety net" should the court falter. And to the extent that the Solicitor General raises concerns about the government's evidence becoming stale during an appeal in which a plea is vacated, the government itself has the means to prevent that. The prosecutor's presence and full knowledge at the plea colloquy adequately protects any government interest in making sure that pleas are taken correctly in a timely fashion.

[15] Although all the provisions of Rule 11 are not constitutionally required, parts of subsection (c) and (d) are. It is not unusual for a rule of criminal procedure to cover, and sometimes expand upon, constitutional rights of defendants. *See, e.g.*, Rule 43 regarding a defendant's right to be present at all stages of a trial.

knowing, on the record and personally made by the defendant. *Id.*; *McCarthy*, 394 U.S. at 466.

The government's application of the raise-or-forfeit rule to a guilty plea colloquy would result in the waiver of important constitutional rights by silence. That is unacceptable. In *Barker v. Wingo*, the Court discussed why presuming waiver of a fundamental right from inaction is inconsistent with the clear pronouncements on waiver of constitutional rights; and among the very examples the Court gave of the principle was *Boykin*. 407 U.S. at 526.

Although the Court has never expressly addressed the applicability of plain error review to Rule 11 violations, especially those which go directly to ensuring the plea is voluntary and intelligent, it has seemed to assume that an objection is *not* necessary. As noted, Rule 52(b) was in place at the time of *McCarthy*; and yet it was not mentioned in that opinion despite the lack of a contemporaneous objection to the Rule 11 violation. In *Boykin*, the Court expressly rejected the argument that it could not review challenges to the voluntariness or intelligence of pleas where no objection had been made below, 395 U.S. at 241-42; and, as in *McCarthy*, the Court did not mention Rule 52(b). In *United States v. Timmreck*, 441 U.S. at 784, there had been no objection in the district court to the judge's failure to advise about special parole; while holding that this "technical violation" of Rule 11 was not cognizable on collateral review, the Court expressly noted that Timmreck could have raised his challenge on direct review. And most recently, in *Bousley*, the Court found that a challenge to a guilty plea was defaulted *not* by the failure to object in the district court (which Bousley had not done), but by the failure to raise his challenge on direct appeal; indeed, the Court expressly noted that

Bousely's challenge – being a claim that his plea was unintelligent because the information provided him by the district court at his plea colloquy was inaccurate – was the very "type of claim [that] can be fully and completely addressed on direct review based on the record created at the plea colloquy." 523 U.S. at 622.

In *United States v. Olano*, 507 U.S. 725 (1993), the Court recognized that Rule 52(b) would be applicable to unobjected-to error "unless some other provision authorizes the error's correction." *Id.* at 732. Rule 11(h) and this Court's jurisprudence authorize the correction of a Rule 11 violation affecting the voluntary or intelligent nature of the plea.

B. Vonn is Not Required to Establish That Absent the Rule 11 Violation He Would Not Have Pleaded

1. A Defendant is Prejudiced under Rule 11 if The Plea is Unconstitutional

If plain error applies to an unobjected-to Rule 11 violation, the defendant bears the burden to establish prejudice. If harmless error applies, the government bears the burden to establish the lack of prejudice. As in many proceedings, the allocation of the burden will likely determine which side prevails. *See Speiser v. Randall*, 357 U.S. 513, 525-26 (1958). But first it is necessary to understand the nature of the prejudice caused by a Rule 11 violation.

Under both the harmless error provision of Rule 11(h) and the plain error provision of Rule 52(b), the error must have affected "substantial rights" in order to entitle the defendant to relief. The government asserts that this means that the error must have affected the "outcome" or

the "result" of the proceeding, but that assertion glides over the definition of the "outcome" or "result" of a proceeding in which a criminal defendant pleads guilty.

The government's premise is that the outcome or result of a Rule 11 proceeding is the defendant's guilty plea. Thus, under the government's analysis, the error has affected the outcome only if the defendant would not have pleaded guilty absent the error. But the government has missed a step in the analysis, the constitutional step. The outcome of a Rule 11 proceeding is, or at least is supposed to be, a constitutional plea, that is, a voluntary and intelligent plea. Thus, any Rule 11 (or other) violation that adversely affects the voluntariness or intelligence of the plea is, by definition, prejudicial. And it simply does not matter whether the defendant would have pleaded guilty even if the violation had not occurred.

When a district court fails to fulfill its duty under Rule 11, error has occurred. But all Rule 11 violations are not the same: some have the potential for rising to the level of constitutional errors because they affect the voluntariness or intelligence of the plea. Other Rule 11 violations do not have that potential; they are merely violations subject both to any procedural requirements placed in the rule and to any reasonable, non-constitutional prejudice analysis the Court adopts. If a court fails, for example, to tell the defendant that his answers under oath to any question could be used against him in a later perjury prosecution, that would be merely a Rule violation with no potential for affecting the voluntariness or intelligence of the plea. The Advisory Committee would be free to subject that error to plain error review if the defendant did not object (although it has not done that),

and a reviewing court would be free to adopt a test of prejudice that allowed for relief only if the defendant would not have pleaded had he been properly advised of a later perjury prosecution.

But some of the provisions of Rule 11 go directly to ensuring that the plea is voluntary and intelligent. The court's duty to advise the defendant of the nature of the charges (Rule 11(c)(1)), the custodial consequences of a conviction (Rule 11(c)(1)), and the constitutional rights he is waiving by foregoing a trial (Rule 11(c)(3) and (4)) is aimed at ensuring that the plea is intelligent; and the court's duty to inquire into any force, threats or promises (Rule 11(d)) is aimed at ensuring that the plea is voluntary. Thus, the court's failure to fulfill those particular Rule 11 duties has the potential of causing an involuntary or unintelligent plea, that is, an unconstitutional plea.

Whether the court's failure to fulfill its duties under Rule 11(c)(1), (c)(3), (c)(4) or (d) rises to the level of a constitutional violation will depend on whether, at the time of the plea, the defendant actually had the requisite knowledge or was actually making a free choice. The record must affirmatively show that the plea was voluntary and intelligent. *Boykin*, 395 U.S. at 242-43. If the court has advised and inquired as required by Rule 11, the record will, of course, affirmatively show that the plea was voluntary and intelligent. If the court has failed to advise or inquire as required by Rule 11, a reviewing court will have to look to see if there is otherwise an affirmative showing that the plea was voluntary and intelligent.[16] But absent an affirmative showing that the

---

[16] What a reviewing court may look at to make that determination is the subject of Part C, *infra*.

plea is voluntary and intelligent, the plea is considered involuntary and unintelligent and is, therefore, unconstitutional.

2. An Unconstitutional Plea Can Never Be Harmless Error

No harmless error analysis could or does apply to an unconstitutional plea, and this Court has never attempted to apply one. The Court's discussion in *Sullivan v. Louisiana*, 508 U.S. 275 (1993), shows why.

The error in *Sullivan* was a constitutionally deficient reasonable doubt instruction; the issue was whether such an error could be harmless. A unanimous court held that it could not. The Court engaged in two separate analyses to support its holding: a *Chapman* analysis and a *Fulminante* analysis. Under *Chapman*, a reviewing court considers what effect the constitutional error had on the actual verdict. "The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Sullivan*, 508 U.S. at 279. The Court noted that where the error is an improper reasonable doubt instruction, the entire premise of *Chapman* review "is simply absent."

> There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is *no object*, so to speak, upon which harmless error scrutiny can operate. The most an appellate court can conclude is that a jury *would*

> *surely have found* petitioner guilty beyond a reasonable doubt – not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough.

Sullivan, 508 U.S. at 280 (emphasis in original).

That analysis is equally applicable to the situation in which a plea is constitutionally deficient because it was either unintelligent or involuntary. In such instances, there being no intelligent and voluntary plea, the question whether the same intelligent and voluntary plea would have been rendered absent the constitutional error is meaningless.[17]

---

[17] An intelligent plea requires the defendant to have sufficient information, and a sufficient understanding of that information, to choose intelligently between the alternatives. A plea is, therefore, unintelligent if the defendant is without the information necessary to assess "the advantages and disadvantages of a trial as compared with those attending a plea of guilty." *Brady*, 397 U.S. at 754.

Here, Vonn was not told of his right to counsel at trial. Giving up a trial at which he might have to defend himself is significantly different than giving up a trial at which counsel would defend him. Thus, Vonn did not have the information necessary to intelligently assess the advantages and disadvantages of a trial as compared with those attending a guilty plea; he did not have the information about what a "trial" was and what rights he would have at one. His plea was, therefore, unintelligent. The fact that he might have made the same choice even if he had had the knowledge does not retroactively make the choice he made intelligent at the time it was made; his actual choice was unintelligent, although the hypothetical intelligent choice might have been identical.

The most the appellate court would ever be able to conclude is that the defendant would surely have entered a voluntary and intelligent plea had he been properly advised.[18] But that is not enough. If a defendant's guilty plea is not voluntary and intelligent, "it has been obtained in violation of due process and is therefore void." *McCarthy*, 394 U.S. at 466.

The *Fulminante* analysis also leads to the conclusion that harmless error analysis does not apply. In *Fulminante*, the Court distinguished between "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards," 499 U.S. at 309, and trial errors which occur "during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented." *Id.* at 307-08. In *Sullivan*, the Court held that the denial of the right to a jury verdict beyond a reasonable doubt was "certainly" a structural error, involving

---

[18] That is the standard the government is asking this Court to adopt. The government would allow an appellate court to determine the defendant would have pleaded guilty absent any error if, for example, his sentence was sufficiently lenient or if he had no viable defense to the charges. That approach entirely supplants the requirement of a voluntary and intelligent plea. The Court noted in *Sullivan* that "[t]he Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty." 508 U.S. at 280. In the same way, the Constitution requires more than appellate speculation about a hypothetical plea, or entering judgment on no plea at all would be sustainable on appeal as long as the appellate court could speculate that the defendant would have surely pleaded guilty had he been given the chance.

the type of right "whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function." 508 U.S. at 281.

A constitutionally deficient guilty plea is also a structural error. A plea of guilty is more than an admission of conduct; it is a conviction. *Boykin*, 395 U.S. at 242. The requirement that a plea be voluntary and intelligent is also a right "whose precise effects are unmeasurable, but without which a criminal [proceeding] cannot reliably serve its function." *Sullivan*, 508 U.S. at 281. The function of a criminal proceeding is to determine that the defendant actually did commit a crime. That determination can be made only upon a jury finding beyond a reasonable doubt or upon a voluntary and intelligent guilty plea. Without one or the other, the proceeding has not reliably served its function. And it does not matter that a jury would surely have found the defendant guilty beyond a reasonable doubt or that the defendant would surely have entered a voluntary and intelligent plea.

3. This Court Has Never Applied Harmless Error Analysis to an Unconstitutional Plea

This Court has never applied any type of harmless error analysis to an involuntary or unintelligent guilty plea either on direct appeal or on collateral review. *McCarthy* and *Boykin* are direct appeal challenges to guilty pleas where no objection was raised in the trial court. The Court expressly refused to attach any significance to the lack of an objection in *Boykin* and never discussed any significance to it in *McCarthy*; and in neither case did the Court apply any type of harmless error approach.

In *United States v. Timmreck*, the Court held that a technical violation of Rule 11 was not cognizable on collateral review,[19] but found it unnecessary to consider whether habeas relief would be available if there were "other aggravating circumstances" and noted that Timmreck had not alleged *either* that his plea was unintelligent or that he would not have pleaded guilty had the Rule 11 violation not occurred. 441 U.S. at 784-85. *Henderson v. Morgan* expressly allows collateral relief for an involuntary or unintelligent plea[20] and specifically rejects even the relevance, let alone the determinativeness, of the issue whether the defendant would have pleaded guilty absent the violation that affected the intelligence of his plea. 426 U.S. at 643-44 & n.12.[21]

---

[19] The violation in *Timmreck* was the district court's failure to advise the defendant of a special parole term. Citing *McCarthy*, the Court noted that Timmreck could have raised that violation on direct appeal but did not.

[20] *Morgan* came out of state court and thus is not a Rule 11 case. Nevertheless, the violation was the trial court's failure to advise the defendant of a critical element of the charge; the duty to advise of the nature of the charge is required in federal court by Rule 11(c)(1).

[21] The government seems both to attempt to distinguish *Morgan* and to argue that it supports the notion that an unconstitutional plea can be harmless. *See* Pet. Br. at n.17. As the government notes, *Morgan* dealt with a constitutionally defective plea. All pleas taken without complete adherence to Rule 11 will not be constitutionally defective, but those taken without the advice required by Rule 11(c)(1), (2), (3) and (4) or the inquiry required by Rule 11(d) potentially result in involuntary or unintelligent (and therefore unconstitutional) pleas; in those latter cases, the situation is virtually identical to that presented in *Morgan*.

The government relies strongly on *Hill v. Lockhart*, 474 U.S. 52 (1985), to support its contention that the nature of prejudice should be whether the defendant would have pleaded guilty absent the error infecting his plea. Pet. Br. 33. But *Hill* actually shows the fallacy of the government's argument when the flaw in the plea is a voluntariness or intelligence issue.

The Court in *Morgan* left no room for a harmless unconstitutional plea. Indeed, the Court expressly rejected the relevance of the "assumed" fact that Morgan would have pleaded even if he had received correct information. 426 U.S. at 643-44 & n.12. Contrary to the government's assertion, the Court did not suggest that the error in failing to accurately advise Morgan of the intent element of murder could be harmless if he had no intent defense. Although the Court noted Morgan's unusually low mental capacity, suggested that it explained counsel's failure to fully explain the intent element of murder to his client, and noted it foreclosed the conclusion that the error was harmless beyond a reasonable doubt, it did so only in answering the state's dire predictions of numerous collateral challenges to pleas. The Court had already held that it was irrelevant whether the defendant would have pleaded guilty even if he had been properly advised; it makes no sense that the Court would find that factor irrelevant and yet suggest that the error might be harmless if the defendant did not actually have a defense. And the concurring opinion of four justices made clear that, regardless of the strength of the evidence on intent, or the lack of a defense on the issue, or the sound judgment of a lawyer that a conviction would be inevitable, a plea without the defendant's personal understanding of the intent element "cannot be 'harmless error.' " 426 U.S. at 650.

In any event, even if an unconstitutional plea could be subject to harmless error review on collateral review, it cannot be on direct review.

Hill did *not* raise a direct challenge to his plea; and even on collateral attack, his challenge was expressly not to the voluntariness or intelligence of his plea. 474 U.S. at 56. Hill's complaint was that he did not know when he pled that he would be required to serve half of his sentence before he became eligible for parole. *Id.* at 53. It was precisely because such a lack of knowledge did not affect the voluntariness or intelligence of his plea that Hill's only challenge could be ineffective assistance of counsel; thus, he argued that his attorney had failed to advise him about the minimum time he would have to serve before parole. This Court noted that *Strickland v. Washington*, 466 U.S. 668 (1984), requires a showing both of an attorney failing and of the prejudice of a reasonable probability that absent the attorney's failing the result of the proceeding would have been different. It found that Hill had not made any allegation that he would not have pleaded guilty had counsel properly advised him and so was not entitled to relief. *Id.* at 56-58.

Thus, the analysis in *Hill* is a *Strickland* analysis and not a voluntariness or intelligence analysis. And the opinion in *Hill* makes express mention of the differences. For example, the Court noted that the government is not responsible for and not able to prevent attorney errors in advising clients, *id.* at 57-58; but the district court and the government are responsible for constitutionally valid pleas, and the court and the government are able to prevent involuntary and unintelligent pleas by following the procedures of Rule 11. Moreover, the Court in *Hill* linked the interest in finality to the requirement that petitioners challenging pleas based on faulty advice of counsel establish prejudice. *Id.* at 58. That interest is noticeably weaker when the challenge to a plea is raised

on direct appeal, and it weighs significantly less heavily when balanced against an involuntary or unintelligent plea.[22]

The government draws no distinction between direct review and collateral review, and no distinction between either of those and an ineffective assistance of counsel claim. But there are different interests involved in each type of challenge, and there is no justification for adapting the analysis of one to the others.

4. The Government's Approach Would Insulate Virtually All Pleas from any Appellate Review

It is important to understand that the adoption of the approach proffered by the government would result in no relief for a Rule 11 violation in virtually any case. The government's premise for why an objection is so critical is that the district court will correct the Rule 11 failing if it is brought to its attention; if that premise is sound, the only Rule 11 violations appellate courts would see would be those without objections in the district court. If the burden is on the defendant to establish that he would not have pleaded absent the unobjected-to Rule 11 violation, no defendant could obtain relief on appeal. Since, by

---

[22] A *Strickland* analysis always requires a stronger showing of prejudice than a direct challenge. For example, if a defendant shows that the court failed to advise him of his right to appeal as required by Rule 32(a), the only prejudice he must show is that he did not otherwise know of his right to appeal. *Peguero v. United States*, 526 U.S. 23, 28 (1999). But if a defendant raises an ineffective assistance of counsel claim for his attorney's failure to advise him about his right to appeal, he must show that he would have appealed if counsel had properly advised him. *Roe v. Flores*, 528 U.S. 470 (2000).

definition, the issue would not have come up in the district court (or else it would be a Rule 11 violation that *was* objected to), the appellate record would shed absolutely no light on whether the defendant would have pleaded absent the violation; and no defendant would be able to meet his burden on appeal.[23]

No defendant would be able to obtain relief on collateral review either. Most Rule 11 violations are not cognizable on collateral review. *Timmreck*, 441 U.S. 780. Although a constitutional violation rendering the plea involuntary or unintelligent is cognizable on collateral review, the claim is defaulted if not raised on direct review. *Bousley*, 523 U.S. at 615. But even if the defendant could establish cause and obtain relief from his default, how would he prove that he would not have pleaded guilty absent the Rule 11 violation? As the Court recognized in *Morgan*, a defendant's testimony that he would not have pleaded guilty is entirely hypothetical and quite problematic. 426 U.S. at 644 n.12; *see also McCarthy*, 394 U.S. at 469 (rejecting government's suggestion that Rule 11 violation should be subject to harmless error and

---

[23] Under the government's approach, the defendant would have to prove not just that he would not have pleaded guilty, but also that the reason he would not have pleaded guilty was directly related to the Rule 11 violation. Thus, Vonn's motion to withdraw his plea in the district court, a clear indication that he had not genuinely meant to plead guilty, would not satisfy his burden because it was based on his misunderstanding of the nature of the charge and not on his ignorance of his right to counsel at trial. But one would never expect there to be a motion to withdraw a plea based on inadequate advice in violation of Rule 11, because a defendant does not know he has the rights or that the advice was supposed to be given, and thus does not realize that those grounds exist for such a motion.

noting that a defendant will usually have to rely only on his "plaintive allegations that he did not understand" and will rarely prevail).

The government's argument leaves Rule 11 meaningless. It leaves rights without remedies. It leaves duties without any means either to enforce them or to remedy the failure to fulfill them.

C. Appellate Review is Restricted to the Plea Colloquy

If direct appeal review of the validity of a guilty plea challenged on the basis of a Rule 11 violation that directly affects the voluntariness or intelligence of the plea is limited to whether the plea was indeed voluntary and intelligent (and does not include whether the defendant would have pleaded guilty absent the error), the scope of review becomes an issue. What may the reviewing court consider in determining whether the plea was voluntary and intelligent despite the Rule 11 violation?[24]

The government contends that an assessment of the prejudice flowing from any error requires a review of the "entire record," and that this is the proper scope of

---

[24] If the Court finds that the nature of prejudice for a Rule 11 violation that directly affects the voluntariness or intelligence of the plea is whether the defendant would have still pleaded absent the error, the scope of review would necessarily be almost limitless. The issue would come up only on collateral review, because an appellate record will never shed light on that type of inquiry. And since the reviewing court would not be deciding whether the defendant rendered a knowing and intelligent plea but rather whether he would have rendered a knowing and intelligent plea if given the chance, there would be no reason to limit the scope of the review to the plea colloquy or to any particular event or set of events.

review for a Rule 11 violation. Pet. Br. 39-45. That contention, however, misunderstands the nature of the error.

The scope of review in assessing prejudice is necessarily determined by the nature of the error. Prejudice flowing from errors that occur during a trial is usually assessed in the context of the trial. For example, the prejudice from prosecutorial misconduct, as the government points out, is assessed in the context of the entire trial, including the evidence introduced and the arguments made by both parties. *See United States v. Yong*, 470 U.S. 1 (1985). That makes sense because the prejudice of such errors is the impact the error has on the jury; and whatever impact that was, it was part of the entire trial the jury heard and saw.

But, as the government also notes, some errors are different; they are not part of a trial or the prejudice is not the way they may have affected the jury. Often, the assessment of prejudice from such errors is indeed limited to a particular proceeding. When a defendant's right to be present at all critical stages of a trial is violated, for example, prejudice is assessed not by looking at the trial as a whole and weighing the defendant's absence against the outcome of the trial, but rather by looking solely at the proceeding at which he was absent. *See Lewis v. United States*, 146 U.S. 370 (1912).

To be constitutionally valid, a guilty plea must be voluntary and intelligent *at the time it is made*. That is, indeed, the very purpose of both the Rule 11 and the *Boykin* colloquies: to ensure that the plea is voluntary and intelligent at that time. *McCarthy*, 394 U.S. at 465 (Rule 11 "is intended to produce a complete record *at the time the plea is entered*"); *Boykin*, 395 U.S. at 244 (when the judge discharges his duties, "he leaves a record adequate for

any review that may be later sought . . . and forestalls the spin-off of collateral proceedings that seek to probe murky memories"). Both Rule 11 and *Boykin* are prophylactic rules meant to ensure voluntary and intelligent pleas; and like all prophylactic rules, one of their main purposes and goals is to avoid later factual disputes about what a defendant actually knew or did not know at the time. *See, e.g., Minnick v. Mississippi*, 498 U.S. 146, 151-53 (1990) (discussing the advantage of *Miranda* in providing "clear and unequivocal guidelines" as to the duties of law enforcement and thus "conserv[ing] judicial resources which would otherwise be expended in making difficult determinations" based on individual characteristics of suspects).[25] The Court discussed this very concern at some length in *McCarthy*:

> Rule 11 is designed to eliminate any need to resort to a later fact-finding 'in this highly subjective area.' . . . The Rule 'contemplates that disputes as to the understanding of the defendant and the voluntariness of action are to be eliminated at the outset.' . . . 'When the ascertainment is subsequently made, greater uncertainty is bound to exist since in the resolution of disputed contentions problems of credibility and of reliability of memory cannot be avoided.' . . . There is no adequate substitute for demonstrating in the record *at the time the plea is entered* the defendant's understanding. . . .

394 U.S. at 469-70 (emphasis added).

---

[25] *Miranda* provides an apt analogy to Rule 11. *Miranda* sets forth clear and unequivocal rules regarding advisements that a suspect must be given before custodial questioning can take place. When those advisements are not given, courts are not allowed to look to see if the suspect knew his constitutional rights despite the lack of advisement.

Once the Court accepts that proceedings other than the guilty plea colloquy may be considered in assessing the state of the defendant's knowledge at the time he entered his plea, the determination becomes necessarily complicated. The government suggests that the reviewing court should look at the initial appearance, the post-indictment arraignment, written plea agreements, any statements made by either the defendant *or* his lawyer, even a defendant's failure to "show surprise" when finally given the information to see if the defendant actually knew of the omitted information. Pet. Br. 42-43. The government cannot cite to any other context in which this Court has found a waiver of constitutional rights to be knowing based on statements made by third parties or a defendant's failure to show surprise.

And, of course, no logic would restrict the inquiry to just those incidents mentioned by the government. If the inquiry is whether the defendant was ever told of his rights, any advisement would seem relevant. If the defendant has been to law school, would what he learned in criminal procedure class qualify? If the defendant pleaded guilty ten years earlier in an unrelated case, would what he was told then qualify? If defendant had discussed his upcoming plea with a jailhouse lawyer, would that prisoner's statements about defendant's constitutional rights qualify? If the defendant had been present sometime when another defendant pleaded guilty, would what the court told that defendant qualify? Indeed, the Seventh Circuit has recently suggested that what a defendant has seen on television may qualify to show that he was really aware of his constitutional rights

when he pleaded. *United States v. Driver*, 242 F.3d 767 (7th Cir. 2001).[26]

But there are problems even if the inquiry is restricted to other judicial proceedings in the case before the court. The government encourages the Court to look at Vonn's initial appearance and post-indictment arraignment. It is true that at both those proceedings a judge advised of certain constitutional rights,[27] but that was in the context of collectively advising many defendants about many rights, most of them having nothing to do with constitutional rights at trial. Indeed, much of the

---

[26] The government suggests that restricting to the plea colloquy the inquiry into what the defendant actually knew when he pleaded would lead to "absurd results" because a defendant could plead in the middle of trial and if the plea colloquy failed to show he was told of his trial rights he had already been exercising, the plea would be considered unintelligent. Pet. Br. 43-44. That may be, but certainly the result in such a rare situation is not any more absurd than determining that the defendant really was aware of his rights because he did not show surprise when finally told or because he watched *Perry Mason* on television when he was a child. No matter what rule the Court adopts, one can conjure up "absurd results" that will occur from time to time. But we are discussing the waiver of critical constitutional rights and the taking of pleas that result in prison terms; certainly, we should adopt the rule most likely to ensure that pleas are voluntary and intelligent at the time they are given and not one allowing us to second guess the defendant's state of mind or knowledge later on – second guessing which will inevitably lead to mistakes in finding that a defendant had knowledge when he really did not.

[27] As to the constitutional right of representation by counsel at trial, the advisement at the initial appearance was less than clear. The magistrate advised that defendants had the right to representation by retained counsel at every stage of the proceedings, but he did not make that express advisement regarding appointed counsel.

judges' statements at those proceedings had to do with bail and detention, an issue probably of vastly greater concern to the defendants at those stages of proceedings than constitutional rights at trial. It is unreasonable to assume that the advisements as they related to constitutional rights at trial had any particular meaning to any particular defendant at that point.[28]

More important, a defendant's knowledge that a right exists in the abstract is *not* the knowledge necessary to make his plea intelligent. An intelligent plea is an *informed* choice between the available options. To make an informed choice to plead guilty and forego trial, a defendant must understand not just that he has the right but that the plea of guilty means he is waiving that right. Nothing in any of the group advisements made at initial appearances or post-indictment arraignments even hints at waiver of constitutional rights, and there can be no reasonable assumption that a defendant told months earlier in an entirely unrelated context of some rights would connect those to a waiver of trial when he pleads guilty.

Although this Court has never expressly addressed the scope of review when evaluating a guilty plea challenge based on a claim that the plea was not intelligent, the Court has seemed to assume that the intelligence of a plea is dependent on what is said at the plea colloquy. In *Bousley*, for example, the Court held that Bousley had defaulted his intelligence challenge to his plea by not

---

[28] Although the written advisements to which Vonn put his "X" were more personal to him, they were not made by the court. And this Court has discussed the problems inherent in attempting to determine the nature and scope of a defendant's understanding by form advisements and written waivers. *See Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948).

raising it on direct appeal. The Court expressly noted: "This type of claim can be fully and completely addressed on direct review based on the record created at the plea colloquy." 523 U.S. at 622. And the Court has consistently rejected voluntariness or intelligence challenges to pleas based on the defendant's information *after* he pled, holding that the relevant inquiry is his knowledge and state of mind *at the time of the plea*. *See, e.g., Brady*, 397 U.S. at 757; *McMann v. Richardson*, 397 U.S. 759, 767-68 (1970).

The very purpose of Rule 11 in general and subsection (g) in particular is to prevent the type of searching factual inquiry that the government is proposing.[29] The court is required to advise the defendant on the record and by personally addressing him so that there can be no doubt that the plea is intelligent. And a record of the colloquy is required so that a reviewing court can assess whether the plea was intelligent. There is no need to go

---

[29] The government contends that restricting review to the plea colloquy is inconsistent with "the plain intent of Rule 11(h)." Pet. Br. 42. But nothing about adapting harmless error to Rule 11 errors instructs what the scope of review is to be. Indeed, the Advisory committee Notes from 1983, when (h) was added to Rule 11, suggest strongly that the intent was to restrict appellate review to the plea colloquy. The Committee expressly listed *McCarthy* as an example of a Rule 11 violation which would be prejudicial even under subsection (h), and in *McCarthy*, the Court had decidedly rejected the government's argument that it should look to events other than the plea colloquy to determine the extent of the defendant's knowledge at the time his plea was given. 394 U.S. at 648-70; *see also United States v. Coronado*, 554 F.2d at 173-74, (cited by the Advisory Committee, expressly rejecting the notion that reviewing court may "look beyond the four corners of the Rule 11 proceeding" to determine the defendant's knowledge).

outside the record of the plea colloquy, and doing so only invites extended hearings, wastes judicial resources and risks sanctioning unintelligent pleas.

D. Vonn's Guilty Pleas Must be Vacated

If the Court finds that no objection is necessary to preserve a Rule 11 issue (or a voluntariness or intelligence issue) for direct appellate review, then there is no relevance to the fact that neither Vonn nor his attorney made an objection at the time of the plea colloquy. But even if the Court finds that an objection is necessary to avoid plain error review, plain error would still be inapplicable to this case. An objection *was* made in the district court, albeit by the prosecutor.

The government dismisses the prosecutor's objection as irrelevant, noting that it was not exacting in pointing out the district court's failing (referencing only the failure to advise on "right to counsel" and not "right to counsel at trial") and thus left the defense with an obligation to make the exacting objection. Pet. Br. 17 n.5. But the fact remains that the Rule 11 error was brought to the court's attention. That is not only relevant, it is in fact determinative.

The court has a duty under Rule 11. The duty is clearly set forth in the Rule, and the district court is charged with knowledge of its duty. Even were an objection necessary, an objection setting forth in general terms the court's failure is sufficient. In determining the sufficiency of objections, this Court has "applied the general principle that an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore

sufficient to preserve the claim for review." *Douglas v. Alabama*, 380 U.S. 415, 422 (1965).[30] Given the general principle and the fact that the court's duty is clearly set forth in Rule 11, the prosecutor's objection satisfied the purpose of any requirement for an objection. And inasmuch as the purpose of an objection is to give the court an opportunity to take corrective action, it cannot possibly make a difference who objects. The district court's failing was brought to its attention, and the district court chose not to take any corrective action. The Rule 11 violation is amply preserved for review even if an objection is a prerequisite.

If the issue is preserved for appeal, either because no objection was necessary or because the prosecutor's objection suffices, it is the government's burden to establish lack of prejudice. If an objection was necessary and the prosecutor's objection is not sufficient (and the error is subject to any type of harmless error analysis), it is Vonn's burden to establish prejudice. Under Vonn's analysis, the nature of prejudice is only whether he had actual knowledge of that which the court failed to advise him; under the government's analysis, the nature of prejudice

---

[30] In *Douglas*, the Court held that defense counsel's objection to a document being read by the prosecutor during cross-examination of a witness was sufficient to preserve a confrontation challenge for review, although no specific confrontation challenge was noted and state procedure was not adhered to entirely. *See also Osborne v. Ohio*, 495 U.S. 103, 122-24 (1990) (defense motion to dismiss case prior to trial on grounds that statute was overbroad and covered constitutionally protected photographs and not just lewd photographs was sufficient to preserve issue of failure of jury instructions to specify lewdness requirement).

is whether Vonn would have pleaded guilty even had he known. Either way, Vonn is entitled to relief.

Alphonso Vonn was 21 years old when he was arrested for the bank robbery which led to the charges in this case. He had never been arrested before; he had never been in custody before; he had never been through the criminal justice system before. There is no reason to expect that he had ever even heard of, let alone fully comprehended, most of his constitutional rights.

He was charged with serious crimes that carried an absolute minimum of five years in prison, a usual term of about ten years in prison, and a potential of thiry years in prison. He was held in custody before trial, thereby facing the stress of being away from his family and community in addition to the stress of a likely lengthy prison term.

He had a viable defense, at least to the charge of using a firearm in the course of a violent felony. He maintained consistently, including in open court, that he did not personally have or use a gun and that he was unaware of the guns his accomplices had until they pulled out the weapons inside the bank.

He tried to understand the proceedings and his predicament. He asked questions. He noted to the court that, although his lawyer came to see him often, he was having trouble understanding what he was being told: "I'm not quite understanding what [counsel's] trying to – what's the information given to me, because I don't know nothing about the system. So I don't really know – understand what he is saying." He asked for a new lawyer expressly because he was not understanding what was happening; he was told he could have one only if he could afford to hire one.

The district court did not fulfill its responsibilities under Rule 11. That is error. The error in this case is not a technical violation of Rule 11 but rather concerns the constitutional rights Vonn was giving up by pleading guilty. Thus, the error went directly to the intelligence of his pleas. Nothing else said or done during either of his plea colloquies advised him of his right to counsel at trial.

Even if we look to the other proceedings the government suggests should be considered in evaluating the scope of Vonn's knowledge, we still are left with substantial doubt as to whether he understood that he had the right to counsel at trial and knew that he was giving up that right by pleading guilty. At his initial appearance on the original complaint, he was told only that *retained* counsel would represent him at every stage, never that appointed counsel would represent him at trial. The post-indictment arraignment on the original indictment was manifestly inadequate: the very purpose of the proceeding was to arraign Vonn so he could enter his plea, but no plea was ever even requested of him. Vonn was never properly arraigned on the superseding indictment, and he was not advised of any rights after the filing of that indictment. Although he put his "X" on a written advisement of rights, he did that with counsel – and the record is clear that he was having trouble understanding counsel.

There is no way to know for certain whether Vonn would have pleaded guilty if he had been properly advised. Certainly, there was no particular advantage to pleading guilty: the government made no concessions, no agreements to even recommend a particular sentence and no offer to dismiss any charge. Vonn exhibited conflicted feelings about pleading guilty from the beginning, first

saying he would not, then saying he would, then attempting to withdraw his plea. He consistently maintained his innocence on the most serious charge, the gun use. Under such circumstances, any small thing might have changed his mind, particularly advice concerning his right to counsel, since he expressed concern about understanding the attorney he had.

There is nothing to suggest that Vonn was either attempting to thwart judicial economy or trying to manipulate the system in any way. He moved to withdraw his plea promptly, before he even knew what his sentence was going to be. He had expressly disputed the factual basis for his plea to the gun use at the plea colloquy, and he was no doubt confused by the legalese explanation of conspiracies and Pinkerton liability. He had lawful grounds to withdraw the plea and should have been allowed to do so. Although the grounds he proffered to withdraw his plea did not include the specific Rule 11 violation, he had no way of knowing either that there had been a violation of Rule 11 or that such a violation would be grounds to withdraw his plea.

Given all these circumstances, Vonn has satisfied any burden he bears. The Court of Appeals was correct in vacating his pleas.

CONCLUSION

For all these reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

MARIA E. STRATTON
Federal Public Defender
MONICA KNOX*
Deputy Federal Public Defender

Counsel for Respondent
**Counsel of Record*

APPENDIX

RELEVANT RULE PROVISIONS

Federal Rule of Criminal Procedure 11; Pleas

(a) **Alternatives**

. . .

(b) **Nolo contendere**

. . .

(c) **Advice to Defendant**. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable that the court may also order the defendant to make restitution to any victim of the offense; and

(2) if the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant; and

(3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a

jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination; and

(4) that if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement; and

(6) the terms of any provision in a plea agreement waiving the right to appeal or to collaterally attack the sentence.

(d) **Insuring That the Plea is Voluntary**. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.

(e) **Plea Agreement Procedure**

. . .

(f) **Determining Accuracy of Plea**

. . .

(g) **Record of Proceedings**. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

(h) **Harmless Error**. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.

Federal Rule of Criminal Procedure 52; Harmless Error and Plain Error

(a) **Harmless Error**. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) **Plain Error**. Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.